

\* The original of this document contains information which is subject to withholding from disclosure under 5 U.S.C. 552. Such material has been deleted from this copy and replaced with XXXXXX's.

April 19, 2005

DEPARTMENT OF ENERGY  
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: September 10, 2004

Case No.: TIA-0188

XXXXXXXXXXXXXXXXXX (the Applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy (OWA) for DOE assistance in filing for state workers' compensation benefits for her late husband. The OWA referred the application to an independent Physician Panel (the Panel), which determined that the Worker's illness was not related to his work at the DOE. The OWA accepted the Panel's determination, and the Applicant filed an Appeal with the DOE's Office of Hearings and Appeals (OHA), challenging the Panel's determination. As explained below, we have concluded that the Appeal should be granted.

*I. Background*

*A. The Relevant Statute and Regulations*

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the Act) concerns workers involved in various ways with the nation's atomic weapons program. See 42 U.S.C. §§ 7384, 7385. As originally enacted, the Act provided for two programs. Subpart B established a Department of Labor (DOL) program providing federal compensation for certain illnesses. See 20 C.F.R. Part 30. Subpart D established a DOE assistance program for DOE contractor employees filing for state workers' compensation benefits. Under the DOE program, an independent physician panel assessed whether a claimed illness or death arose out of and in the course of the worker's employment, and exposure to a toxic substance, at a DOE facility. 42 U.S.C. § 7385o(d)(3); 10 C.F.R. Part 852 (the Physician Panel Rule). The OWA was responsible for this program.

The Physician Panel Rule provided for an appeal process. An applicant could appeal a decision by the OWA not to submit an application to a Physician Panel, a negative determination by a Physician Panel that was accepted by the OWA, and a final decision by the OWA not to accept a Physician Panel determination in favor of an applicant. The instant appeal was filed pursuant to that Section. The Applicant sought review of a negative determination by a Physician Panel that was accepted by the OWA. 10 C.F.R. § 852.18(a)(2).

While the Applicant's appeal was pending, Congress repealed Subpart D. Ronald W. Reagan Defense Authorization Act for Fiscal Year 2005, Pub. L. No. 108-375 (October 28, 2004) (the Authorization Act). Congress added a new subpart to the Act, Subpart E, which establishes a DOL workers' compensation program for DOE contractor employees. Under Subpart E, all Subpart D claims will be considered as Subpart E claims. *Id.* § 3681(g). In addition, under Subpart E, an applicant is deemed to have an illness related to a workplace toxic exposure at DOE if the applicant received a positive determination under Subpart B. *Id.* § 3675(a).

During the transition period, in which DOL sets up the Subpart E program, OHA continues to process appeals of negative OWA determinations.

## B. Procedural Background

The Applicant filed a Subpart B application with DOL and a Subpart D application with OWA, claiming that the Worker's metastatic prostate cancer was related to toxic exposures during employment at DOE. The Applicant stated that the Worker was employed as a machinist at the Oak Ridge Y-12 site from 1943 to 1944 and at the Paducah Gaseous Diffusion Plant (the Paducah site) from 1951 to 1964. See OWA Record at 8. The DOL referred the Subpart B application to the National Institute of Occupational Safety and Health (NIOSH) for a radiation dose reconstruction. Record at 18.

The Applicant requested that OWA send her case to the Panel without awaiting the completion of the NIOSH dose reconstruction. Record at 18. The OWA forwarded the application to the Physician Panel, asking it to review the Worker's employment at the Paducah site.

The Physician Panel rendered a negative determination. The Panel stated that there is no epidemiologic evidence of increased prostate cancer risk from exposure to occupational radiation. See Panel Report. The OWA accepted the determination, and the Applicant filed the instant appeal.

In her appeal, the Applicant states that the Panel did not consider the Worker's complete employment history, i.e., it did not consider the claimed employment at the Oak Ridge Y-12 site. See Applicant's Appeal Letter.

## *II. Analysis*

Under the Physician Panel Rule, independent physicians rendered an opinion whether a claimed illness was related to exposure to toxic substances during employment at a DOE facility. The Rule required that the Panel address each claimed illness, make a finding whether that illness was related to toxic exposure at the DOE site, and state the basis for that finding. 10 C.F.R. § 852.12.

The record indicates that the OWA did not consider the Applicant's claim that the Worker was employed at the Y-12 site. The record contains no information indicating that OWA asked the site to confirm this employment. Instead, the record indicates that the OWA limited its processing of the application to the Worker's employment at the Paducah site.

The Applicant's claim of Y-12 employment should have been considered, because it might have involved toxic exposures not considered by the Panel. See *Worker Advocacy*, Case No. TIA-0153 (2005). Accordingly, further consideration of this claim should include a request that the site confirm the claimed employment and provide any relevant records.

As the foregoing indicates, the appeal should be granted. In compliance with Subpart E, the claim will be transferred to the DOL for review. The DOL is in the process of developing procedures for evaluating and issuing decisions on these claims. OHA's denial of this claim does not purport to dispose of or in any way prejudice the DOL's review of the claim under Subpart E.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in *Worker Advocacy*, Case No. TIA-0188, be, and hereby is, granted as set forth in paragraph 2 below.
- (2) The OWA did not process the Applicant's claim of employment at the Oak Ride Y-12 site. Consideration of that claim is in order.

(3) This is a final order of the Department of Energy.

George B. Breznay  
Director  
Office of Hearings and Appeals

Date: April 19, 2005